IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

SUMMONS FOR JUDGMENT NO.527 OF 2006
IN
SUMMARY SUIT NO. 1360 OF 2006

M/s. Engineering Project India Ltd. ...Plaintiff.

V/s.

M/s. Nila Bauart Engineering Ltd. ... Defendant.

....

Ms. Mili V. Thakkar a/w. Mr. Girish J. Desai a/w. Ms. S.V. Thakkar a/w. Ms. Rujuta Joshi i/b. S.V.Thakkar & R.V.Thakkar for the Plaintiff.
Mr. Jaydeep Raut i/b. Sunil Nair for Defendant 1.
Mr. H.N. Thakure with Agnes Baradza i/b. Thakur Jariwala & Associates for Defendant 2.

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CORAM : DR. D.Y.CHANDRACHUD,J.

03rd April 2007.

P.C. :

. The suit under Order 37 of the Code of Civil Procedure, 1908 has been instituted on the basis of eight Bank Guarantees furnished to the Plaintiff. The details of the Bank Guarantees are as follows :-

No.BG01/310036 for	Rs.20,00,000/-
No.BG01/310037 for	Rs.20,00,000/-

No.BG01/310038	for	Rs.20,00,000/-
No.BG01/310206	for	Rs.25,00,000/-
No.BG01/310207	for	Rs.25,00,000/-
No.BG01/310176	for	Rs.25,00,000/-
No.BG01/310252	for	Rs.40,00,000/-
No.BG01/310253	for	Rs.35,00,000/-

The Bank Guarantees were furnished by Global Trust Bank Limited. The Bank, it is common ground before the Court, has merged with the Second Defendant, the Oriental Bank of Commerce in pursuance of a Notification of the Reserve Bank of India under the Banking Regulation Act, 1949. The Second Defendant is hence the successor in interest of the erstwhile Global Trust Bank Limited.

2. In order to facilitate submissions before the Court all Counsel have adverted to the Bank Guarantee dated 15th May 2002 (Exhibit B-1 to the plaint). All the eight bank guarantees, it is common ground, were in similar terms. The guarantee recites that under the terms of the contract between the First Defendant and the Plaintiff, the First Defendant was required to

obtain a Bank Guarantee in order to guarantee the proper and faithful performance of the contract, in an amount of Rs.20 lakhs. The guarantee then provides as follows :-

We, GLOBAL TRUST BANK LTD. having its Registered Office at Ashoka My Home Chambers, 2 to 5 Floor (Western Portion), 1-8-303 Sardar Patel Road, Secunderabad - 500 003 and among other places and a branch at G-1 & G-2, "Concord" R.C. Dutt Road, Alkapuri, Baroda 390 007, as instructed by the Contractor, **agree unconditionally and irrevocably to guarantee as primary obligator and not as Surety merely, the payment to ENGINEERING PROJECTS (INDIA) LTD, MUMBAI, on his first demand without whatsoever right of objection on our part and without his first claim to the Contractor, in the amount not exceeding Rs.20,00,000/-** (Rupees Twenty Lakhs only), **such amount to be reduced periodically by**

the amounts recovered by you from the proceeds of the contract,"

3. The guarantee then stipulates that :

> "No drawing may be made by you under this guarantee until we have received notice in writing from you that an advance payment of the amount listed above has been paid to the Contractor pursuant to the contract."

4. The drawing of funds under the guarantees was subject to the condition that the bank should have received a notice in writing from the Plaintiff that an advance payment of the amount listed thereunder had been paid to the contractor in pursuance of the contract. Such letters were in fact addressed on 28th February 2003 by the Plaintiff to the Bank and are annexed at Exhibits G-1 to G-8 of the plaint. On 6th January 2003, a letter was addressed by the Plaintiff to the First Defendant with a the copy to the Second Defendant recording that six of the guarantees were expiring

between 14th February 2003 and 21st February 2003. The Plaintiff sought an extension of the period of validity upto 21st August 2003. While endorsing a copy to the Second Defendant, the Plaintiff stated that in the event that the First Defendant failed to extend the period of validity within the stipulated period of each guarantee, the letter may be treated as a claim against the guarantee, and the guaranteed amount may be remitted by demand draft payable at Mumbai to the Plaintiff. Eventually, on 6th March 2003, notices of encashment were issued by the Plaintiff to the second Defendant in respect of eight bank guarantees (Exhibits D-1 to D-8 to the plaint).

5. The Plaintiff, which is a Government of India undertaking moved the Ombudsman appointed in terms of clause 18 of the Banking Ombudsman Scheme 2002. Initially, by an order dated 31st December 2004, the Ombudsman directed the Second Defendant to pay to the Plaintiff the entire amount of the eight Bank Guarantees forthwith. The Second Defendant filed a review before the Ombudsman. By an order dated 1st February 2006, the Ombudsman modified the

earlier order and called upon the Bank to honour and pay the proceeds of six Bank Guarantees in the total amount of Rs.1.35 crores, to the Plaintiff. However, in so far as two Bank Guarantees in the amount of Rs.40 lakhs and Rs.35 lakhs (bearing Nos.BG 01/310252 and BG 01/310253) were concerned, the Ombudsman was of the view that the Plaintiff had failed to establish having invoked the aforesaid Bank Guarantees by its letter dated 6th January 2003. The Ombudsman was of the view that the Plaintiff had not established that the aforesaid letter had been duly served upon the Second Defendant within the period of validity. Those two Bank Guarantees were to expire on 20th February 2003 and 21st February 2003.

6. At the hearing of the Summons for Judgment, the Second Defendant has advanced three submissions in defence to the claims founded on the guarantees. The first defence is that the bank guarantees were not unconditional. The second defence is that two of the bank guarantees (BG 01/310252 and BG 01/310253) in the amount of Rs.40 lakhs and Rs.35 lakhs expired on 20th February 2003 and 21st

February 2003; the invocation dated 6th January 2003 was not duly proved to have been served upon Second Defendant and it was only on 6th March 2003 after the expiry of the period of validity that an invocation took place. The third defence is in regard to the jurisdiction of the Court to entertain and try the suit.

7. The issue of jurisdiction can be taken up in the first instance. The bank guarantees provide that the bank upon demand unconditionally and irrevocably guarantees as a primary obligator, payment to the Plaintiff which is described as " Engineering Products India Limited, Mumbai" on first demand and without a right of objection (emphasis supplied). In paragraph 21 of the plaint it has been averred that (i) The guarantees were furnished by the Defendants to the Western Regional Office of the Plaintiff at Mumbai; and (ii) Payments of the amounts due thereunder were due by the second Defendant to the Plaintiff in Mumbai; (iii) The guarantees were invoked at Mumbai; and (iv) The second Defendant also carries on business at Mumbai. Having regard to the terms of the

guarantees, it is abundantly clear that payments were due to the Plaintiff in Mumbai and the guarantees were furnished to the Plaintiff at Mumbai. This Court clearly therefore has jurisdiction to entertain and try the suit.

8. The contention that was however urged before the Court is that the guarantees were not unconditional. Now, the terms of the guarantees provided that the Bank agreed unconditionally and irrevocably to guarantee the payment of each of the guarantees on first Demand without a right of objection and without the Plaintiff being required to first claim from the first Defendant, an amount not exceeding what is stipulated in each guarantee. The guarantees undoubtedly stipulate that the amount would stand reduced periodically by the amount recovered by the Plaintiff from the proceeds of the contract. The guarantees also stipulate that no drawing could be made thereunder until the bank received a notice in writing from the Plaintiff that the advance payment listed thereunder had been paid to the contractor pursuant to the contract. In terms of the each of the

guarantees, the Plaintiff addressed letters to the Second Defendant on 28th February 2003 stating that advance payment with reference to each of the bank guarantees was made to first Defendant. Thereafter, by a letter dated 22nd May 2003, to which a detailed chart was annexed, the Plaintiff furnished to the Second Defendant with reference to each guarantee : (i) The date of the advance; (ii) The mode of payment; (iii) The amount of payment; (iv) The amount of deduction; and (v) The consequent reduction of the amount of the bank guarantee. The chart showed that no deduction had been made by the Plaintiff and that consequently the amount of the bank guarantees would not stand reduced. Once this disclosure was made by the Plaintiff to the Second Defendant that would bind the Second Defendant in terms of the clause contained in the guarantee under which the bank agreed to pay on first demand without a right of objection. The conditions subject to which the bank guarantees could be encashed were duly fulfilled. It was thereafter not open to the Bank, to step into the shoes of the contractor and to raise disputes which it was precluded from raising

by the unconditional terms on which a demand in terms of the guarantees had to be honoured by the bank.

9. The third submission in defence is that two of the bank guarantees to which a reference has already been made earlier in the total amount of Rs.40 lakhs and Rs.35 lakhs respectively expired on 20th February 2003 and 21st February 2003 and that the invocation of 6th March 2003 must be regarded as invalid, being submitted after the expiry of the period of the two guarantees. On the other hand, the Plaintiff relies upon the invocation dated 6th January 2003 (Exhibit D). The Second Defendant has disputed having received the said letter of invocation. The Plaintiff has relied upon the receipt issued by the Postal Department of the despatch of the letter and on the presumption of due service contained in clause 27 of Section 27 of the General Clauses Act. There is in my view, prima-facie, merit in the submission of the Plaintiff that the defence raised by the Second Defendant is an afterthought. No such defence was raised by the Second Defendant during the course of

the lengthy correspondence that was carried on between the parties. In fact, neither in its letter dated 7th May 2003 nor in its letter dated 13th May 2003 (Exhibits H-1 to H-8) did the Global Trust Bank raise any such defence. On the contrary, in the letters dated 7th May 2003, the Global Trust Bank confirmed its obligation in terms of **all the eight Bank Guarantees** including the two Bank Guarantees on which a dispute has been raised, on particulars being furnished of the advance payment to the contractor. The defence that the invocation was not within the period of validity was not raised by the Global Trust Bank. Moreover, it is a matter of significance that the letter dated 6th January 2003 refers to several Bank Guarantees including the two Bank Guarantees which are in dispute. One of the Bank Guarantees (3100254) was to expire on 21st February 2003 and the proceeds thereof were in fact paid on 18th June 2003. The Guarantees at Serial Nos.3,4 and 5 (bearing Nos.BG-02/310036, 310037 and 310038) were to expire on 14th February 2003 and were extended by the Bank. The Bank has not explained how this exercise was carried out if it was not with

reference to the letter dated 6th January 2003. Therefore, apart from the presumption that applies under Section 27 of the General Clauses Act, 1897, there is intrinsic evidence to establish that the defence is neither bonafide nor genuine.

10. The discussion in the earlier part of the judgment would thus show that in so far as six of the eight Bank Guarantees on which the suit is founded are concerned, there is absolutely no valid defence whatsoever. Even in regard to the other two Bank Guarantees it has been found that the defence is lacking in bonafides. However, in the interests of justice, I am of the view that leave to defend the suit should be granted to the Second Defendant only in so far as two of the Bank Guarantees are concerned viz. :-

(i) BG01/310252 for Rs.40,00,000/-

(ii) BG01/310253 for Rs.35,00,000/-

A condition of deposit is in my view is necessary having regard to the underlying terms of Bank Guarantees. Such guarantees ought to be honoured

in terms of the tenor of the guarantees. The whole edifice of credit and finance which rests on such Bank Guarantees will be defeated if banks are permitted to wriggle out of the duty to comply with their obligations. Leave to defend will therefore be confined only to the aforesaid two Bank Guarantees subject to the condition of deposit as mentioned above. The suit shall, in the circumstances, stand partially decreed against the Second Defendant insofar as the remaining 6 Bank Guarantees are concerned. Insofar as the First Defendant is concerned, unconditional leave would have to be granted having regard to the fact that the Bank Guarantees, on the basis of which the suit has been instituted, constitute a bipartite agreement between the Second Defendant and the Plaintiff. It is a well settled principle of law that a Bank Guarantee is a bipartite contract between the issuing Bank and the beneficiary.

11. No other defences other than those which have been adverted to hereinabove have been pressed or urged at the hearing of this Summons for Judgment.

12. Hence, the following order :-

(i) There shall be a decree in the amounts due and outstanding in respect of six Bank Guarantees as against the Second Defendant viz.

No.BG01/310036	for	Rs.20,00,000/-
No.BG01/310037	for	Rs.20,00,000/-
No.BG01/310038	for	Rs.20,00,000/-
No.BG01/310206	for	Rs.25,00,000/-
No.BG01/310207	for	Rs.25,00,000/-
No.BG01/310176	for	Rs.25,00,000/-

(ii) The Plaintiff would be entitled to interest at the rate of 9% per annum on the amounts decreed under the aforesaid six Bank Guarantees from the date of the respective letters of invocation dated 6th March 2003, to the date of the suit and from the institution of the suit until payment or realisation;

(iii) The Second Defendant is granted leave to defend the Suit insofar as the following two Bank Guarantees are concerned viz.

No.BG01/310252 for	Rs.40,00,000/-
No.BG01/310253 for	Rs.35,00,000/-

This shall be subject to a deposit by the Second Defendant of the sums of Rs. 40,00,000/- and Rs.35,00,000/- due and payable under the aforesaid two Bank Guarantees with the Prothonotory and Senior Master within a period of 8 weeks from today. The amounts upon deposit shall be invested in a fixed deposit of a Nationalised Bank to be renewed periodically thereafter during the pendency of the Suit; and

(iv) The First Defendant will be entitled to unconditional leave to defend the Suit.

13. The Summons for Judgment is accordingly disposed of.